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Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1994

BP PERFORMANCE POLYMERS, INC.,

Petitioner,

v.

ETHYL CORPORATION; TRAVELERS INSURANCE COMPANY; LUDGATE INSURANCE CO., LTD.; COMPAGNIE EUROPEENE d'ASSURANCES INDUSTRIELLES S.A.; ASSICURIAZIONI GENERALI, S.P.A.; UTICA MUTUAL INSURANCE COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In departing from decisions of other federal courts of appeals, did the Eighth Circuit err in not remanding this case for a new trial after deciding as a matter of law that this case was improperly tried before, submitted to, and decided by the jury under the incorrect law on liability and damages?

2. Did the Eighth Circuit violate the defendant's Due-Process and Seventh-Amendment rights when it re-examined and rejected the jury's specific, material fact findings, reversed the judgment for the defendant, and then ordered entry of judgment for the plaintiff?

LIST OF PARTIES

Petitioner BP Performance Polymers, Inc. ("BP") has no subsidiary. BP America Inc. is the direct parent corporation and sole owner of BP. BP America Holdings Limited is the indirect parent corporation of BP and sole owner of BP America Inc. BP International Limited is the indirect British parent corporation of BP and sole owner of BP America Holdings Limited. The British Petroleum Company p.l.c. is the indirect British parent corporation of BP and sole owner of BP International Limited. Continental Insurance Company is the direct insurer of BP.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, BP Performance Polymers, Inc. ("BP"), respectfully requests that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The opinion of the Court of Appeals for the Eighth Circuit ordering judgment entered for the Respondents,

Ethyl Corporation and its insurers (collectively, "Ethyl"), appellants below, is reported as *Ethyl Corp. v. BP Performance Polymers, Inc.*, 33 F.3d 23 (8th Cir. 1994). This opinion is reprinted in the appendix to this petition. (App. 1-7.) The appeal of Ethyl was from judgment entered 24 May 1993 for BP following a trial by jury. (App. 9.) The district court issued no opinion.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on 22 August 1994. The Court of Appeals for the Eighth Circuit denied BP's timely petition for rehearing *en banc* on 29 September 1994. (App. 8.) The jurisdiction of this Court is proper under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Seventh Amendment: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

United States Constitution, Fifth Amendment: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . . "

STATEMENT OF THE CASE

At various times from 1985 through 1987, Ethyl purchased a polyethylene chemical compound (or "anti-fog" concentrate) from BP. Ethyl used this anti-fog concentrate as an additive in a clear plastic film wrap that it sold to General Mills, Inc. for use in packaging "Fruit Roll-ups," a snack-food product of General Mills. Ethyl sold its film wrap to General Mills with written certifications guaranteeing that its product was "food-grade" quality and in compliance with the federal Food, Drug, and Cosmetic Act of 1938 and that it would not impart any off taste or odor. Despite making this guarantee, Ethyl neither informed BP of the actual end use of its product, nor independently evaluated its film wrap for FDA compliance, nor obtained any guarantee from BP that its chemical-compounding process was food-grade quality, nor tested its film wrap for off taste or odor. Ethyl's conduct in this regard was contrary to its own internal policies, industry practice, and FDA regulations.

In April 1987, General Mills received customer complaints that some of its Fruit Roll-ups had an off taste. Following investigation, General Mills and Ethyl determined that some of the plastic wrap that Ethyl had sold to General Mills was not food-grade quality. After a nationwide recall of Fruit Roll-ups, General Mills sued Ethyl for Ethyl's failure to provide a food-safe product. Ethyl and its insurers eventually settled the lawsuit by paying General Mills $8,960,000.

Over a year after settlement, Ethyl brought this lawsuit against BP in Iowa state court and BP subsequently removed to federal district court on the basis of diversity of citizenship. Ethyl sought what amounted to reimbursement for its settlement with General Mills. Ethyl's complaint included a variety of claims, but following BP's summary-judgment motion, Ethyl's negligence and strict-liability claims were dismissed and Ethyl proceeded to trial only on breach-of-warranty claims. Before trial, the parties briefed and argued the question of whether the Iowa Comparative Fault Act, Iowa Code §§ 668.1-.15 (1993) ("the Iowa Act"), should apply to Ethyl's breach-of-warranty claims. BP argued that the Iowa Act applied to Ethyl's claims. BP also suggested, in the alternative, that the district court should certify this question to the Iowa Supreme Court to provide certainty on this critical issue. Ethyl opposed the motion, *including* BP's request for certification of the question to the state court. The district court eventually declined to certify the question and ruled on its own that, according to plain statutory language, the Iowa Act applied to Ethyl's claims.

Following this ruling, BP prepared for trial, submitted pre-trial motions and exhibits, entered into certain stipulations of fact, prepared its witnesses, and prepared proposed jury instructions and a verdict form – all with the understanding that Ethyl's claims would be tried under the Iowa Act. Throughout the trial, BP presented substantial evidence to the jury that Ethyl's conduct was the cause of General Mills' damages. This included evidence: (1) that Ethyl had failed to test BP's anti-fog concentrate or its own film wrap for any off taste before selling the product to General Mills and (2) that Ethyl had

failed to follow FDA regulations, its own policy, and industry custom and practice when it gave repeated written assurances to General Mills about the FDA status and the food-grade quality of its film wrap without obtaining prior identical assurances from its suppliers, like BP. (*See* App. 12-13 (Instruction No. 21).)

At the close of trial, the district court gave several substantive instructions to the jury on the issues of damages, proximate cause, and comparative fault. These included an instruction, *mandated by the Iowa Act*, that if the jury found Ethyl's fault to be more than fifty percent of the cause of Ethyl's damages, Ethyl would recover nothing from BP. (App. 11.) After instruction and closing arguments, the case was submitted to the jury with written copies of the court's instructions and a comparative-fault verdict form. (App. 10-13 (selected instructions) & App. 14-16 (verdict form).)

The jury returned the six-question verdict form with specific factual findings. The first two questions and answers established that BP breached an express warranty to Ethyl. The remaining questions revealed the following factual findings in this order:

> [Question 3:] Was [BP's] breach *a* proximate cause of damage to [Ethyl]?
>
> Yes [X] No [ ]
>
> [Question 4:] *Making no reduction for fault, if any, you may attribute to plaintiff Ethyl*, what are plaintiffs' total damages?
>
> [Answer:] $9,367,000

> [Question 5:] What are Ethyl's damages for lost profits included in your answer to Question #4 above?
>
> [Answer:] $ 0
>
> [Question 6:] Taking the total fault of defendant BP and plaintiff Ethyl to equal 100%, what percentage of the total fault do you attribute to defendant BP and plaintiff Ethyl?
>
> | | |
> |---|---|
> | Defendant BP | 30% |
> | *Plaintiff Ethyl* | *70%* |
> | Total: | 100% |

(App. 15-16 (emphasis added).) In sum, the jury found: (1) that BP's breach of an express warranty was *a* cause – not *the* cause – of damages to Ethyl; (2) that Ethyl was seventy percent (and BP only thirty percent) at fault for the damages Ethyl claimed; and (3) that Ethyl's damages were $9,367,000 *without* reduction for fault attributable to Ethyl.[1]

Because the jury found Ethyl more than fifty percent at fault, the district court – on the ground that the Iowa Act prevented any recovery – awarded judgment to BP. Ethyl filed post-trial motions alternatively seeking (1) judgment as a matter of law in the amount of $9,367,000; (2) judgment as a matter of law for thirty percent of that amount, proportionate to the jury's finding of fault; or (3) a new trial. These motions were denied, and Ethyl and its insurers appealed from the judgment in BP's favor.

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[1] The figure of $9,367,000 merely represented the stipulated amount that Ethyl had paid to General Mills ($8,960,000) plus other stipulated expenses of Ethyl (approximately $400,000).

Ethyl made its own (belated) motion on appeal that the question of the applicability of the Iowa Act be certified to the Iowa Supreme Court, but this motion was denied. On the merits on appeal, Ethyl argued, among other things, that the Iowa Act did not apply to its claims and that judgment should be entered in its favor or, in the alternative, a new trial ordered. BP responded arguing that the district court had properly instructed the jury under the Iowa Act and that a fair reading of the verdict form – which showed that Ethyl was seventy percent at fault – indicated that Ethyl, not BP, had proximately caused Ethyl's damages. BP specifically argued that if the appellate court disagreed with its arguments to affirm, the only remedy was a new trial with new instructions to the jury.

The Eighth Circuit ruled in Ethyl's favor on the applicability of the Iowa Act. Although it recognized the unsettled nature of the question under Iowa law, the court of appeals predicted that, because Ethyl's breach-of-warranty claims involved no physical harm to persons or property, the Iowa Supreme Court would *not* have applied the Iowa Act to Ethyl's claims. (App. 6.) Instead of remanding for a new trial, however – complete with proper instructions to the jury on the law – the Eighth Circuit ignored the jury's finding of Ethyl's overriding fault and simply remanded the case "to the district court with directions to enter judgment of $9,367,000 in Ethyl's favor." (App. 6-7.) (*See* Question 4 above.)

The Eighth Circuit premised its decision to remand without a new trial – and thus without regard to the

jury's finding that Ethyl was the predominate cause at fault – on at least one substantial, erroneous factual conclusion. The Eighth Circuit stated that "the jury . . . found BP materially breached the express warranty *and proximately caused* Ethyl to incur $9,367,000 in damages." (App. 3.) This statement is not correct, nor is it supported by the jury findings on the verdict form. BP may have sold anti-fog concentrate that did not conform to Ethyl's undisclosed end use, but the jury did not – as the appellate court incorrectly assumed – find that BP proximately caused all of the damages that Ethyl and its insurers had paid to General Mills.

BP timely petitioned the Eighth Circuit for rehearing to correct the appellate panel's error in the disposition of the case. BP explained to the Eighth Circuit that the panel's disposition not only worked a substantial injustice on BP but that it was directly contrary to recent decisions of other courts of appeals and in violation of the Seventh Amendment. BP requested that the Eighth Circuit remand this case to the district court for a new trial, with a jury properly instructed on the law. The Eighth Circuit denied BP's petition for rehearing without explanation. (App. 8.)

REASONS FOR GRANTING THE PETITION

The decision of the Eighth Circuit directly conflicts with recent decisions of the Tenth Circuit, including *Jackson State Bank v. King*, 992 F.2d 256 (10th Cir. 1993), and *Zierke v. Agri-Systems*, 992 F.2d 276 (10th Cir. 1993), and with decisions in other federal courts of appeals. Indeed,

the Tenth Circuit would characterize what the Eighth Circuit did as "manifestly unjust." The proper appellate disposition of a case in which the jury has been incorrectly instructed on comparative-fault principles is a subject of great importance to courts and litigants and – as this case shows – of substantial consequence to the parties affected by the appellate court's disposition.

The Eighth Circuit's disposition of this case also raises questions of fundamental constitutional importance that this Court should resolve – namely, whether the disposition of this case by the Eighth Circuit has violated the Seventh Amendment and the Due Process Clause. The Seventh Amendment expressly prohibits any fact tried by a jury from being re-examined on appeal. By ordering judgment for Ethyl, the appellate panel effectively re-examined and rejected the jury's finding of fact in Question 6 that Ethyl was largely responsible for (or the proximate cause of) its own damages. The appellate panel also effectively reinterpreted the language of Question 4 as contrary to its plain meaning. Proper deference to BP's Fifth and Seventh-Amendment rights precludes entry of a judgment that disregards or re-evaluates any material jury finding. *See Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962).

The decision of the Eighth Circuit also departs far from the usual and accepted course for disposing of cases on appeal when a jury has been incorrectly instructed on the law relating to liability and damages. After determining that the Iowa Act did not apply to Ethyl's claims, the Eighth Circuit should have remanded this case for a new trial so that the jury – not the appellate court – could determine the proper amount of damages, if any, that

should be awarded to Ethyl. The result in this case, awarding judgment to Ethyl based on a misreading of the jury's verdict form, requires an exercise of this Court's power of supervision.

I. The Eighth Circuit's Disposition of this Case Creates an Irreconcilable Conflict with Decisions in the Tenth Circuit and other Circuits.

In *Jackson State Bank*, the Tenth Circuit faced the very same issue as the Eighth Circuit did in this case but reached a contrary conclusion on the proper disposition of the case. In *Jackson State Bank*, a diversity case, the plaintiff brought a legal-malpractice claim alleging breach of fiduciary duty, breach of contract, and negligence. The jury assessed fault at thirty-five percent for the plaintiff, thirty-five percent for the defendant, and thirty percent to a third party. 992 F.2d at 256. The district court entered judgment for the defendant on the ground that the Wyoming comparative-negligence statute barred recovery. *Id.*

On appeal, the Tenth Circuit presented the issue of the applicability of the comparative-negligence statute to the Wyoming Supreme Court in the form of a certified question. The state supreme court answered that because the plaintiff's claims were contractual in nature, the application of the comparative-negligence statute in the district court was incorrect. *See Jackson State Bank v. King*, 844 P.2d 1093 (Wyo. 1993). "This pronouncement of law alter[ed] the legal theories applicable to [the plaintiff's] causes of action. [The] case [had been] tried and instructed under the assumption that the comparative negligence statute applied." *Jackson State Bank*, 992 F.2d at

257. The plaintiff (like Ethyl), nevertheless, asked the Tenth Circuit simply to remand the case for an immediate award of all claimed damages. The Tenth Circuit declined.

The Tenth Circuit held that a new trial was necessary because the appellate court could "only speculate" about the effect of an instruction correctly stating the law on the answers to the verdict interrogatories. *Id.* Quoting from an earlier decision that held the same under similar circumstances, the Tenth Circuit explained:

> "Here, . . . 'it is clear that the jury was not, as it should have been, fully and correctly instructed on the applicable law of the case.' We hold that in this particular case, *it would be manifestly unjust to assume in any way what the jury would have done had it been correctly instructed and not misled regarding the effect on the judgment of its answers to the special interrogatories.* We therefore decline to adjust the damages for which Defendant is liable in accordance with some speculative theory of apportionment on the various causes of action, and remand this case for a new trial."

Id. at 257-58 (ellipsis points in original; emphasis added) (quoting *Phillips v. Duro-Last Roofing, Inc.*, 973 F.2d 869, 871 (10th Cir. 1992)).

Another recent decision of the Tenth Circuit with which the Eighth Circuit is now in conflict is *Zierke v. Agri-Systems*, 992 F.2d 276 (10th Cir. 1993). In *Zierke*, the plaintiff brought a strict-liability claim in federal district court against the manufacturer of a floor auger that had

injured his foot. The jury determined the plaintiff's damages were $150,000. In its answers to verdict-form interrogatories, however, the jury apportioned ninety percent of the responsibility for the accident to the plaintiff and ten percent to the manufacturer. *Id.* at 277. The jury made this apportionment after being instructed – under Wyoming's comparative-negligence statute – that if the plaintiff's degree of negligence was equal to or greater than the negligence attributed to the defendant, the plaintiff would not be able to recover from the defendant. *Id.* at 277 n.1. One month later, the Wyoming Supreme Court issued a decision holding that the state comparative-negligence statute did *not* apply to any strict-liability claim. The district court, consequently, entered an amended judgment awarding the full $150,000 to the plaintiff. *Id.* at 277-78.

On appeal, the Tenth Circuit reversed, observing that, by ascribing ninety percent of the fault to the plaintiff, the jury might have found that the plaintiff had assumed the risk of the injury and, therefore, should be barred from recovery. The appellate court further explained that, in any event, the jury had been incorrectly instructed on the law and judgment could not be entered based on the jury's answers on the verdict form. Accordingly, the appellate court "remand[ed] the case for a new trial on the issue of strict liability with jury instructions that state current Wyoming law and interrogatories that specifically inquire as to whether [the plaintiff] assumed the risk." *Id.* at 279.

The conclusion of the Tenth Circuit in *Jackson State Bank* and in *Zierke* – that a new trial is required – is the

same conclusion reached in other circuits when an appellate court determines that a jury has been incorrectly instructed on the law relating to liability and damages.[2] In *Pratico v. Portland Terminal Co.*, 783 F.2d 255, 268 (1st Cir. 1985), for example, an action under the Federal Employers' Liability Act ("FELA"), the jury returned a verdict for the plaintiff in the amount of $227,000 but also found the plaintiff eighty percent contributorily negligent. As a consequence, the district court reduced the plaintiff's award to $45,000. *Id.* at 257. On appeal, the plaintiff argued, as he had in the district court, that because his injury was caused by the defendant railroad's use of equipment in violation of safety regulations under the Occupational Safety and Health Act ("OSHA"), his employer's action constituted negligence per se. *Id.* at 259-62. He also argued that under FELA his employer's defense of contributory negligence was eliminated because the violation of these safety regulations had led to his injury. *Id.* at 262-68. The First Circuit held that the plaintiff was correct as a matter of law, but it refused to enter judgment for the plaintiff in the full amount of $227,000. The First Circuit, instead, decided that "the proper course of action" was to remand the case for a new trial, one in which the jury would be correctly instructed on the law and allowed to determine whether the employer had in fact violated OSHA regulations and

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[2] This conclusion has also been reached by the highest courts of various states, including states within the Eighth Circuit. *See, e.g., Little Rock Electrical Contractors v. Okonite Co.*, 294 Ark. 399, 402-03, 744 S.W.2d 381, 383 (1988) (jury improperly instructed to apply comparative-fault principles in breach-of-warranty case; new trial required).

whether the violation had caused the plaintiff's injury. *Id.* at 268.

Here, by ordering entry of judgment for Ethyl even though the jury had been incorrectly instructed on liability and damages, the Eighth Circuit created an irreconcilable conflict with the Tenth Circuit in *Jackson State Bank* and *Zierke* and the First Circuit in *Pratico*. The "manifestly unjust" result rejected by the Tenth Circuit – summarily ordering judgment for an award of damages to the plaintiff without a new trial – is exactly what the Eighth Circuit has imposed on BP. This conflict among the circuits is not one formed in dicta, nor is it a conflict in mere principle. It is a real conflict – between circuit decisions very close in time (especially *Jackson State Bank* and *Zierke*) – on the proper disposition of cases. There can be no doubt that if the Tenth Circuit or the First Circuit were faced with this case on appeal, the result would have been dramatically different: the appellate court would have been compelled to remand for a new trial.

Furthermore, unlike some cases that present this Court with a conflict between federal courts of appeals, the issue here is not one on which this Court should postpone consideration for the purpose of allowing further study of the subject in the lower courts. In fact, the opposite is true. Fact finding is a function of the jury, not a court of appeals, and this Court should act now to prevent further erosion of any civil litigant's Seventh-Amendment rights and to prevent further confusion among the circuits about the permissible review of a jury's factual determinations. Sound principles of judicial administration favor swift and efficient disposition of cases, but not without regard to the sanctity of the jury's

fact-finding function or at the expense of substantial justice to the litigants.

This is also not a matter of construing an ambiguous verdict to do substantial justice. The jury's answers in this case were consistent and proper under the comparative-fault principles applied. Once it was determined on appeal that comparative fault should not apply, however, the court of appeals re-interpreted the verdict form in a manner inconsistent with the jury's findings of fact. Thus, the Eighth Circuit's disposition of this case was "manifestly unjust."

II. The Eighth Circuit's Disposition of this Case Raises Questions of Fundamental Constitutional Importance Relating to Due Process and the Express Requirement of the Seventh Amendment that No Fact Tried by a Jury Shall Be Re-Examined in any Court.

The irreconcilable conflict between federal courts of appeals is not the only reason why this Court should grant BP's petition for writ of certiorari. This Court should also review this case because the Eighth Circuit's disposition on appeal raises important questions of constitutional law – namely, whether the Eighth Circuit violated BP's rights under the Fifth and Seventh Amendments by remanding without a new trial.

The Seventh Amendment to the United States Constitution preserves the right to trial by jury in its first clause and, in its second clause, assures that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common

law." U.S. Const. amend. VII. Justice Story explained more than 150 years ago that this second clause of the Seventh Amendment is "a substantial and independent clause" and "more important" than the first clause. *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. (3 Pet.) 433, 446 (1830). The second clause of the amendment strictly limits the power of courts in relation to fact-finding:

> [It] is a prohibition to the courts of the United States to re-examine any facts, tried by a jury, in any other manner. The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo*, by an appellate court, for some error of law which intervened in the proceedings.

Id. The importance of the Seventh Amendment's prohibition is reflected in other pronouncements of this Court, and in situations analogous to this case. *See, e.g., Dimick v. Schiedt*, 293 U.S. 474, 486-87 (1935) (practice of additur – which would allow a trial court to increase the amount of a verdict when a jury has acted improperly, provided the defendant consented – is unconstitutional; new trial required).

As part of their fact-finding function, federal juries regularly assign fault, determine liability and causation, and assess the amount of damages in a wide variety of civil cases. Under the Seventh Amendment, a jury's determination of these facts is inviolate. *See* Fed. R. Civ. P. 38(a). No federal court has authority to re-examine these facts tried by a jury or, in general, to modify the verdict

of a jury that has passed on these issues of fact. These are well-established principles of law.

In *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962), for example, the Third Circuit ignored a jury's special interrogatory answer absolving a third-party defendant from liability and summarily imposed liability "as a matter of law." *Id.* at 358. This Court reversed, finding that the court of appeals had overstepped its authority by essentially retrying the case on appeal: "[N]either we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them." *Id.* at 358-59. *See also, e.g., Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 498 (1931) (ordering new trial and explaining that it is "of vital significance" that "issues of fact be submitted for determination with such instructions and guidance by the court as will afford opportunity for that consideration by the jury").

Here, the jury made critical findings of fact relevant to this petition – which were re-examined and rejected on appeal. First, the jury found that Ethyl's total damages *without any deduction for Ethyl's fault* were $9,367,000, and it entered this amount as its answer to Question 4 on the verdict form. This answer merely reflected the settlement amount that Ethyl and its insurers had paid to General Mills ($8,960,000) plus other stipulated legal and investigation expenses incurred in the underlying action with General Mills (approximately $400,000). Second, the jury found that *Ethyl's own acts and omissions* were the predominate cause of these damages. This was reflected in

the jury's finding in Question 6 that Ethyl was responsible for *seventy percent* of the total fault attributable to both Ethyl and BP.

After predicting that the Iowa Supreme Court would not have applied the Iowa Act to Ethyl's breach-of-warranty claims, the Eighth Circuit summarily ordered judgment entered for Ethyl in the amount inserted by the jury in response to Question 4. This decision thus re-examined (or ignored) the jury's other factual findings, including the findings in Questions 3 and 6 that Ethyl's acts and omissions were the *primary* cause of its own damages. This is a gross misuse of an appellate court's power of review. The Eighth Circuit's disposition in no way represents a reasonable or consistent inference that might be drawn from the jury's answers on the verdict form. After predicting that the Iowa Supreme Court would not have applied the Iowa Act to Ethyl's claims, the Eighth Circuit should have remanded this case to the district court for a new trial rather than try to glean from the trial court record and verdict form its own factual finding on Ethyl's damages.

Finally, for much the same reasons, the Eighth Circuit's disposition of this case violates the Due Process Clause. It is axiomatic that the government may not deprive a person of property without certain procedural safeguards. Indeed, the fundamental requirement of Due Process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). BP received no meaningful review of the facts under the appropriate law, and the Eighth Circuit's ruling, long after the district court had held that the Iowa Act applied, falls far short of a hearing

"at a meaningful time."[3] By reversing the district court and ordering judgment entered for Ethyl without any trial involving the necessary findings of fact by a jury, BP's rights under the Due Process Clause were violated.

III. The Eighth Circuit's Departure from the Accepted and Usual Course of Disposing of Cases Like This on Appeal Requires an Exercise of this Court's Power of Supervision.

This Court has, on prior occasions, granted review on petitions for writ of certiorari when a jury has been given erroneous instructions. Indeed, this Court has required remand for a new trial when the general effect of an erroneous instruction on the jury's decision is unknowable on appeal. *See, e.g., Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 312 (1986) ("The effect of the erroneous instruction [on damages] is therefore unknowable, although probably significant. . . . "; remanded for a new trial). Further, this Court has held that "in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury." *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, 82 (1919) (erroneous and misleading instruction on contributory negligence; remanded for new trial). Unless it appears that the erroneous instructions were "affirmatively harmless," the

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[3] The injustice resulting from the Eighth Circuit's Due-Process violation was exacerbated by the award on appeal of prejudgment interest *against BP*. As a result, because of the passage of time, the actual judgment against BP has grown to over $13 million.

erroneous instructions furnish grounds for a new trial. *Id.* *See also United States v. River Rouge Improvement Co.*, 269 U.S. 411, 421 (1926) ("an error which relates, not to merely formal or technical matters, but to the substantial rights of the parties, – especially when embodied in the charge to a jury, – is to be held a ground for reversal"). Because the Eighth Circuit has departed so far from these principles and "the accepted and usual course of judicial proceedings" by not granting a new trial, this Court should grant this petition and exercise its power of supervision. *See* Sup. Ct. R. 10.1(a).

The district court's ruling that the Iowa Act applied to Ethyl's claims and its concomitant instruction to the jury was not an "affirmatively harmless" error. Until the Eighth Circuit predicted on appeal that the Iowa Supreme Court would have held the Iowa Act inapplicable, the parties were bound to present the case on the law as ordered by the district court. If the district court had ruled before trial that the Iowa Act did not apply, counsel for BP would have tailored its overall defense with a very different analysis on both liability and damages in mind.[4] Moreover, the closing arguments, jury instructions, and

---

[4] This is exactly the legal guidance that *BP* sought when it asked the district court prior to trial to certify the question of the application of the Iowa Act to the state supreme court. Ethyl opposed that motion and the district court declined to certify. It was only after Ethyl lost its case with the jury that Ethyl belatedly made its own request for certification on appeal from its adverse judgment.

verdict form would undoubtedly have been different, both in substance and emphasis.

For example, if comparative fault had been ruled inapplicable *prior* to trial, the case would have been tried, instructed, and decided under the principles of Iowa's commercial code. Accordingly, the jury would have been instructed that any consequential damages must be shown to have been *the* result of the defendant seller's alleged breach of warranty. Under the Iowa code, a plaintiff's consequential damages would *not* include any damages of which the defendant seller had no reason to know and which the plaintiff could not have otherwise reasonably prevented. Iowa Code Ann. § 554.2715(2) (West 1967) (App. 22-23.) In this case, therefore, rather than speaking in terms of apportioned fault, the district court would have instructed the jury to determine the extent to which factors *other* than BP's breach – especially Ethyl's own culpable acts or omissions, both before and after it realized a breach – proximately caused the consequential damages claimed (i.e., Ethyl's settlement payment to General Mills).

In sum, it is impossible to say – as the Eighth Circuit essentially did in disposing of this case on appeal – that if the jury had been properly instructed on the law and had been given a verdict form that accurately reflected the law, the jury would still have come to the conclusion that judgment should go to plaintiff in the amount of $9,367,000. The Tenth Circuit found such a conclusion impossible in *Jackson State Bank* and *Zierke*, and the Eighth Circuit should have found it impossible in this case. By curtly disposing of this case, with directions to the district court "to enter judgment of $9,367,000 in Ethyl's

favor," the Eighth Circuit has brought about a substantial injustice to BP and to the uniformity of appellate review under the Seventh Amendment. This error requires an exercise of this Court's supervisory power to correct.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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22 December 1994

United States Court of Appeals

For the Eighth Circuit

No. 93-3124NI

Ethyl Corporation; Travelers Insurance Company; Ludgate Insurance Co., Ltd.; Compagnie Europeene d'Assurances Industrielles S.A.; Assicuriazioni Generali S.P.A.; Utica Mutual Insurance Company,	*	Appeal from the United States District Court for the Northern District of Iowa.
Appellants,	*	
v.	*	
BP Performance Polymers, Inc.,	*	
Appellee.	*	

Submitted: April 14, 1994

Filed: August 22, 1994

Before McMILLIAN, Circuit Judge, OAKES,* Senior Circuit Judge, and FAGG, Circuit Judge.

FAGG, Circuit Judge.

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* The HONORABLE JAMES L. OAKES, United States Senior Circuit Judge for the Court of Appeals for the Second Circuit, sitting by designation.

The question before us in this diversity case is whether the Iowa Comparative Fault Act (the Iowa Act), Iowa Code §§ 668.1-.15 (1993), applies to Ethyl Corporation's breach of warranty claim seeking recovery of entirely economic losses against BP Performance Polymers, Inc. (BP). Because the Iowa Supreme Court has not decided whether the Iowa Act applies to this type of claim, *see Garren v. First Realty, Ltd.*, 481 N.W.2d 335, 338 (Iowa 1992), we must predict how that court would decide the question. *Brandenburg v. Allstate Ins. Co.*, 23 F.3d 1438, 1440 (8th Cir. 1994). Reviewing the question of state law de novo, *see Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991), we predict the Iowa Supreme Court would not apply the Iowa Act to Ethyl's claim. We thus reverse the district court's contrary decision and remand.

From 1985 through 1987, Ethyl purchased chemical compounds from BP for use in making plastic film wrap. Ethyl in turn sold the wrap to General Mills for use in packaging General Mills's Fruit Roll-ups, a food product. In April 1987, General Mills notified Ethyl it had received complaints that some of its Fruit Roll-ups had a strange taste. Both General Mills and Ethyl investigated the complaints and eventually, in 1989, they determined BP had shipped some contaminated chemical compound to Ethyl and Ethyl had used the contaminated compound in the Fruit Roll-up packaging. After General Mills initiated a nationwide recall of its Fruit Roll-ups, General Mills sued Ethyl for Ethyl's failure to provide a food-safe plastic wrap. The two parties settled the claim, and Ethyl paid $8,960,000 to General Mills under the settlement agreement.

Ethyl then filed this lawsuit against BP, seeking reimbursement from BP for the full amount it paid to General Mills plus damages for loss of revenue, loss of business advantage, costs, and attorney's fees. Initially, Ethyl alleged claims against BP for breach of contract, breach of express warranty, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, negligence, and strict liability. In response to a summary judgment motion by BP, the district court dismissed Ethyl's negligence and strict liability claims, concluding Ethyl's claims "sound[ed] in economic loss" and thus should be resolved under contract law rather than tort law. The district court also noted Ethyl's contract and express warranty claims were virtually identical. Ethyl proceeded to trial on only express and implied warranty theories. Before trial, the district court decided the Iowa Act applied to Ethyl's breach of warranty claims.

At trial, there was no dispute that BP caused the compound contamination. The parties did dispute whether BP knew the compound would ultimately be used with food products, whether Ethyl should have obtained a guarantee from BP of the chemical ingredients used in the compound, and whether Ethyl should have obtained Food and Drug Administration certification of the chemical compound. After trial, a jury found BP made an express warranty to provide Ethyl with uncontaminated chemical compounds. The jury also found BP materially breached the express warranty and proximately caused Ethyl to incur $9,367,000 in damages. Because the jury found Ethyl 70% at fault, however, the district court awarded no damages to Ethyl. *See* Iowa Code § 668.3(1)

(barring recovery by claimant who bears greater percentage of fault than defendants). Ethyl appeals, arguing the district court should have awarded $9,367,000 in damages because the Iowa Act does not apply to Ethyl's breach of warranty claims.

The district court applied the Iowa Act to Ethyl's breach of warranty claim because the plain language of the Iowa Act's fault definition includes the term "breach of warranty." The Iowa Act defines "fault" as

> [O]ne or more acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages.

Iowa Code § 668.1(1). Unlike the district court, we do not believe the Iowa Act applies to all breach of warranty claims, regardless of their nature. Viewing the fault definition in context of the Iowa Act's purpose, Iowa case law, and official comments, we believe the Iowa Act applies only when the breach results in personal injury or property damage.

The Iowa Act "relat[es] to liability in tort by establishing comparative fault as the basis for liability in relation to claims for damages arising from injury to or death of a person or harm to property." 1984 Iowa Acts 524; *see Waterloo Sav. Bank v. Austin ex rel. Austin*, 494 N.W.2d 715,

717 (Iowa 1993). Consistent with the Iowa Act's application in the tort context, the Iowa Supreme Court has held the Iowa Act does not apply when the claim for relief is "contractual in nature." *Austin*, 494 N.W.2d at 717; *Vasquez v. LeMars Mut. Ins. Co.*, 477 N.W.2d 404, 409 (Iowa 1991). As the district court recognized in ruling on BP's summary judgment motion, Ethyl's breach of warranty claim is a contractual one. Under Iowa law, a claim for purely economic loss is recoverable only in contract and not in tort law. *Nelson v. Todd's Ltd.*, 426 N.W.2d 120, 123-25 (Iowa 1988) (entirely economic injuries without accompanying physical injury to person or property are not recoverable under strict liability or negligence).

In addition to this guidance found in Iowa law, the Uniform Comparative Fault Act's official comments state the Uniform Act does not cover contract claims seeking entirely economic recovery. The Iowa Act is patterned after the Uniform Comparative Fault Act and the Uniform Act's official comments are persuasive in interpreting the Iowa Act. *Coker v. Abell-Howe Co.*, 491 N.W.2d 143, 148 (Iowa 1992). Indeed, the Iowa Act's definition of fault is taken directly from the Uniform Act. *Id.* The Uniform Act's official comments state the Uniform Act only covers physical harm to persons or property and consequential damages deriving from physical harm. Uniform Comparative Fault Act § 1 comment, 12 U.L.A. 44 (Supp. 1994). With regard to breach of warranty claims, the comments specifically state:

> An action for breach of warranty is held to sound sometimes in tort and sometimes in contract. There is no intent to include in the coverage of the Act actions that are fully contractual

> in their gravamen and in which the plaintiff is suing solely because [the plaintiff] did not recover what [the plaintiff] contracted to receive. The restriction of coverage to physical harms to person or property excludes these claims.

Id. at 45. We conclude the Iowa Supreme Court would not apply the Iowa Act to Ethyl's claim because it involves no physical harm to persons or property.

BP argues *Renze Hybrids, Inc. v. Shell Oil Co.*, 418 N.W.2d 634 (Iowa 1988), supports the district court's application of the Iowa Act in this case. We disagree. Although the trial court had applied the Iowa Act to Renze's breach of implied warranty claim, the breach caused damage to Renze's property and Renze did not challenge the Iowa Act's application on appeal. *Id.* at 637, 639; *see Manning v. International Harvester Co.*, 381 N.W.2d 376, 378-79 (Iowa Ct. App. 1985) (when defective planting machine caused corn grower's crop to be smaller than it should have been, harm to grower's crop was physical property damage, not economic loss, and thus grower could recover in tort). Ethyl suffered entirely economic loss, thus, *Renze* does not apply here.

Because the district court committed error in applying the Iowa Act to Ethyl's claim, we need not reach Ethyl's remaining arguments. We reverse the district court's judgment, and we remand this case to the district

court with directions to enter judgment of $9,367,000 in Ethyl's favor.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals

For the Eighth Circuit

No. 93-3124NIW

Ethyl Corporation, et al., Appellants, v. BP Performance Polymers, Inc., Appellee.	* * * * * * * * *	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 29, 1994

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

United States District Court
Northern DISTRICT OF Iowa

ETHYL CORPORATION, TRAVELERS INSURANCE CO., UTICA MUTUAL INSURANCE CO., COMPAGNIE EUROPEENE d'ASSURANCES INDUSTRIELLES S.A., LUDGATE INSURANCE CO., LTD., and ASSICURIAZIONI GENERALI, SPA,

Plaintiffs,

vs.

BP PERFORMANCE POLYMERS, INC.

Defendant

JUDGMENT IN A CIVIL CASE

(Filed May 24, 1993)

CASE NUMBER: C90-2064

[X] **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the plaintiff take nothing, that the action is dismissed and that the defendant recover of the plaintiffs its costs of action.

May 24, 1993
Date

/s/ WILLIAM J. KANAK
Clerk

/s/ Cheryll S. Scott
~~*(By) Deputy Clerk*~~
CHERYLL S. SCOTT
Chief Deputy Clerk

051793uN
IC §554.2715
Western Industries, Inc. v. Newcor Canada, Ltd.,
739 F.2d 1198, 1203 (7th Cir. 84)

DAMAGES

Instr. No. 18

If you should find by a preponderance of the evidence that plaintiffs have been damaged, you may award them only such damages as will reasonably compensate and only such damages as you find they sustained as a proximate result of BP's alleged wrongful conduct.

Beyond the purchase price paid by Ethyl for the BP product purchased in 1986, all of plaintiffs' claims are for incidental and consequential damages. Consequential damages are those damages relating to any loss resulting from general or particular requirements or needs of the buyer which the seller had reason to know of at the time of contracting and which could not be reasonably prevented by the buyer. The particular needs of the buyer must be made known to the seller while general needs may be inferred from the circumstances.

Any incidental and consequential damages you award must be foreseeable or have been reasonably foreseen at the time the parties entered into their contract.

051793uN
ICJI 400.1, 400.2, 400.3, 400.4
IC §668.1

COMPARATIVE FAULT – FAULT DEFINED

Instr. No. 20

If you find that plaintiffs have established one or more of the breach of warranty claims and are entitled to damages, you must consider defendant's defense of comparative fault.

"Fault" means one or more acts or omissions which constitute negligence or breach of warranty.

Damages may be the fault of more than one party. In comparing fault, you should consider all of the surrounding circumstances as shown by the evidence, together with the conduct of Ethyl and BP and the extent of the causal relation between their conduct and the damages claimed. You should then determine what percentage, if any, each party's fault contributed to the damages.

After you have compared the conduct of all parties, if you find Ethyl was at fault and that its fault was more than 50% of the total fault, it cannot recover damages. However, if you find Ethyl's fault was 50% or less of the total fault, then its total damages will be reduced by the percentage of its fault.

051793uN
D&B §§ 80.18, 80.19

"PROXIMATE CAUSE" – DEFINED

Instr. No. 23

Damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the damage, and that the damage was either a direct result or a reasonably probable consequence of the act or omission.

This does not mean that the law recognizes only one proximate cause of damage, consisting of only one factor or thing, or the conduct of only one actor. On the contrary, many factors or things, or the conduct of two or more actors, may operate at the same time, either independently or together, to cause damage; and in such a case, each may be a proximate cause.

052093uN
ICJI 400.6
IC §668

COMPARATIVE FAULT – ELEMENTS OF DEFENSE

Instr. No. 21

BP claims Ethyl was at fault in one or more of the following particulars: (1) Ethyl failed to test the BP product or its own film wrap for bad taste prior to selling the

product to General Mills; and (2) Ethyl failed to follow the law and what BP claims was Ethyl's own policy and industry custom and practice to obtain assurances from its suppliers such as BP before giving similar assurances to General Mills about FDA status and direct food application of its film wrap.

In order to establish this defense, BP must prove the following propositions:

1. Ethyl was at fault in one or more of these particulars; and

2. Ethyl's fault was a proximate cause of plaintiffs' damage.

If BP has failed to prove either of these propositions, BP has not proved its defense. If BP has proved both of these propositions, then you will assign a percentage of fault against the plaintiffs on the verdict form.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

ETHYL CORPORATION, TRAVELERS INSURANCE CO., UTICA MUTUAL INSURANCE CO., COMPAGNIE EUROPEENE d'ASSURANCES INDUSTRIELLES S.A., LUDGATE INSURANCE CO., LTD., and ASSICURIAZIONI GENERALI, SPA, Plaintiffs, vs. BP PERFORMANCE POLYMERS, INC. Defendant.	NO. C 90-2064 VERDICT FORM (Filed May 20, 1993)

1. In connection with the sale of its product to plaintiff Ethyl in July of 1986, did defendant BP make an

(a) express warranty	Yes [X]	No [ ]
(b) implied warranty of fitness for a particular purpose	Yes [ ]	No [X]
(c) implied warranty of merchantability	Yes [ ]	No [X]

If your answer to each part of Question #1 is no, answer no further questions. Sign and date the verdict form, and deliver it to the Marshal.

If your answer to any part of Question #1 is yes, answer the applicable corresponding parts of Question #2.

2. Did defendant materially breach its

(a)	express warranty	Yes [X]	No [ ]
(b)	implied warranty of fitness for a particular purpose	Yes [ ]	No [X]
(c)	implied warranty of merchantability	Yes [ ]	No [X]

If your answer to each part of Question #2 is no, answer no further questions. Sign and date the verdict form, and deliver it to the Marshal.

If your answer to any part of Question #2 is yes, answer Question #3.

3. Was defendant's breach a proximate cause of damage to plaintiffs?

Yes [X] No [ ]

If your answer to Question #3 is no, answer no further questions. Sign and date the verdict form, and deliver it to the Marshal.

If your answer to Question #3 is yes, answer Questions #4, #5 and #6.

4. Making no reduction for fault, if any, you may attribute to plaintiff Ethyl, what are plaintiffs' total damages?

$ 9,367,000

5. What are Ethyl's damages for lost profits included in your answer to Question #4 above?

$ 0

6. Taking the total fault of defendant BP and plaintiff Ethyl to equal 100%, what percentage of the total fault do you attribute to defendant BP and plaintiff Ethyl?

Defendant BP	30 %
Plaintiff Ethyl	70 %
Total:	100 %

[Signatures of Jurors]

[Iowa Code § 668.1 (1987):]

668.1 Fault defined

1. As used in this chapter, "fault" means one or more acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages.

2. The legal requirements of cause in fact and proximate cause apply both to fault as the basis for liability and to contributory fault.

[Iowa Code § 668.3 (1987):]

668.3. Comparative fault – effect – payment method

1. Contributory fault shall not bar recovery in an action by a claimant to recover damages for fault resulting in death or in injury to person or property unless the claimant bears a greater percentage of fault than the combined percentage of fault attributed to the defendants, third-party defendants and persons who have been released pursuant to section 668.7, but any damages allowed shall be diminished in proportion to the amount of fault attributable to the claimant.

2. In the trial of a claim involving the fault of more than one party to the claim, including third-party defendants and persons who have been released pursuant to section 668.7, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating all of the following:

a. The amount of damages each claimant will be entitled to recover if contributory fault is disregarded.

b. The percentage of the total fault allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under section 668.7. For this purpose the court may determine that two or more persons are to be treated as a single party.

3. In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party and the extent of the causal relation between the conduct and the damages claimed.

4. The court shall determine the amount of damages payable to each claimant by each other party, if any, in accordance with the findings of the court or jury.

5. If the claim is tried to a jury, the court shall give instructions and permit evidence and argument with respect to the effects of the answers to be returned to the interrogatories submitted under this section.

6. In an action brought under this chapter and tried to a jury, the court shall not discharge the jury until the court has determined that the verdict or verdicts are consistent with the total damages and percentages of

fault, and if inconsistencies exist the court shall do all of the following:

a. Inform the jury of the inconsistencies.

b. Order the jury to resume deliberations to correct the inconsistencies.

c. Instruct the jury that it is at liberty to change any portion or portions of the verdicts to correct the inconsistencies.

7. When a final judgment or award is entered, any party may petition the court for a determination of the appropriate payment method of such judgment or award. If so petitioned the court may order that the payment method for all or part of the judgment or award be by structured, periodic, or other nonlump-sum payments. However, the court shall not order a structured, periodic, or other nonlump-sum payment method if it finds that any of the following are true:

a. The payment method would be inequitable.

b. The payment method provides insufficient guarantees of future collectibility of the judgment or award.

c. Payments made under the payment method could be subject to other claims, past or future, against the defendant or the defendant's insurer.

8. In an action brought pursuant to this chapter the court shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings on each specific item of requested or awarded damages indicating that portion of the judgment or decree awarded for past

damages and that portion of the judgment or decree awarded for future damages.

[Iowa Code § 668.5 (1987):]

668.5. Right of contribution

1. A right of contribution exists between or among two or more persons who are liable upon the same indivisible claim for the same injury, death, or harm, whether or not judgment has been recovered against all or any of them. It may be enforced either in the original action or by a separate action brought for that purpose. The basis for contribution is each person's equitable share of the obligations, including the share of fault of a claimant, as determined in accordance with section 668.3.

2. Contribution is available to a person who enters into a settlement with the claimant only if the liability of the person against whom contribution is sought has been extinguished and only to the extent that the amount paid in settlement was reasonable.

3. Contractual or statutory rights of persons not enumerated in section 668.2 for subrogation for losses recovered in proceedings pursuant to this chapter shall not exceed that portion of the judgment or verdict specifically related to such losses, as shown by the itemization of the judgment or verdict returned under section 668.3, subsection 8, and according to the findings made pursuant to section 668.14, subsection 3, and such contractual or statutory subrogated persons shall be responsible for a

pro rata share of the legal and administrative expenses incurred in obtaining the judgment or verdict.

4. Subrogation payment restrictions imposed pursuant to subsection 3 apply to settlement recoveries, but only to the extent that the settlement was reasonable.

[Iowa Code § 668.6 (1987):]

668.6 Enforcement of contribution

1. If the percentages of fault of each of the parties to a claim for contribution have been established previously by the court as provided in section 668.3, a party paying more than the party's percentage share of damages may recover judgment for contribution upon motion to the court or in a separate action.

2. If the percentages of fault of each of the parties to a claim for contribution have not been established by the court, contribution may be enforced in a separate action, whether or not a judgment has been rendered against either the person seeking contribution or the person from whom contribution is sought.

3. If a judgment has been rendered, an action for contribution must be commenced within one year after the judgment becomes final. If a judgment has not been rendered, a claim for contribution is enforceable only upon satisfaction of one of the following sets of conditions:

a. The person bringing the action for contribution must have discharged the liability of the person from

whom contribution is sought by payment made within the period of the statue of limitations applicable to the claimant's right of action and must have commenced the action for contribution within one year after the date of that payment.

b. The person seeking contribution must have agreed while the action of the claimant was pending to discharge the liability of the person from whom contribution is sought and within one year after the date of the agreement must have discharged that liability and commenced the action for contribution.

[Iowa Code § 554.2715:]

554.2715 Buyer's incidental and consequential damages

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include

> (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.

FILED
JAN 20 1995
OFFICE OF THE CLERK

(2)

No. 94-1141

In the
Supreme Court of the United States
October Term, 1994

BP PERFORMANCE POLYMERS, INC.,
Petitioner,

v.

ETHYL CORPORATION; TRAVELERS INSURANCE COMPANY; LUDGATE INSURANCE CO., LTD.; COMPAGNIE EUROPEENE d'ASSURANCES INDUSTRIELLES S.A.; ASSICURIAZIONI GENERALI, S.P.A.; UTICA MUTUAL INSURANCE COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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45 pp

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QUESTION PRESENTED FOR REVIEW

1. Does the petition satisfy the criteria for certiorari where, after reversing the district court's ruling on a purely state law issue, the Eighth Circuit Court of Appeals reversed the district court's judgment and remanded the case with directions to enter judgment in plaintiff's favor in conformity with the jury's express findings in favor of plaintiff on each element of plaintiff's claim against defendant?

LIST OF PARTIES

1. Respondent The Travelers Corporation. Ethyl Corporation was insured under a policy issued by The Travelers Indemnity Company and The Travelers Insurance Company. Both companies are subsidiaries of The Travelers Corporation. Additional subsidiaries of The Travelers Corporation include:

    a) The Center for Corporate Health, Inc.;
    b) Conservco, Inc.;
    c) Constitution Plaza, Inc.;
    d) KF Corporation;
    e) The Massachusetts Company, Inc.;
    f) The Plaza Corporation;
    g) The Prospect Company;
    h) Resource Information Management Systems, Inc.;
    i) Travelers Asset Management International Corporation;
    j) Travelers Canada Corporation;
    k) The Travelers Corporation of Bermuda Limited;
    l) Travelers Corporation (U.K.), Ltd.;
    m) Travelers/E.B.S., Inc.;
    n) Travelers Equities Sales, Inc.;
    o) Travelers Health Network, Inc.;
    p) The Travelers Insurance Company of Illinois;
    q) Travelers Insurance Corporation Proprietary, Ltd.;
    r) The Travelers Investment Management Company;
    s) Travelers of Ireland, Ltd.;
    t) Travelers Keystone Fixed Income Advisors;
    u) The Travelers Marine Corporation;

v) Travelers Mortgage Securities Corporation;
w) Travelers Plan Administrators, Inc.;
x) Travelers Realty Investment Company;
y) Travelers Specialty Property Casualty Co. Inc.;
z) Travtech, Inc.;
aa) U. S. Behavioral Health.

Subsidiaries of The Travelers Insurance Company include The Travelers Life and Annuity Company. Subsidiaries of The Travelers Indemnity Company include:

a) The Phoenix Insurance Company;
b) The Charter Oak Fire Insurance Company;
c) The Constitution State Insurance Company;
d) C.S.I., Inc.;
e) The Travelers Reinsurance Company of Bermuda, Limited;
f) The Travelers Lloyds Insurance Company;
g) Bankers and Shippers Insurance Company;
h) Travelers Home & Marine Insurance Company;
i) Travco Insurance Company;
j) First Trenton Indemnity Company.

2. Ethyl Corporation. Ethyl Corporation does not have a parent corporation. Ethyl Corporation has no subsidiaries that have issued shares to the public, and it does not have any affiliates that have issued shares to the public.

3. Utica Mutual Insurance Company. Utica Mutual Insurance Company does not have a parent corporation. Utica Mutual Insurance Company has no subsidiaries, is not owned by any publicly held companies, and does not have any affiliates that have issued shares to the public.

4. Compagnie Europeene d'Assurances Industrielles S.A. Compagnie Europeene d'Assurances Industrielles S.A. is a wholly-owned subsidiary of Petrofina S.A (Brussels). Compagnie Europeene d'Assurances Industrielles S.A. has no subsidiaries, and it does not have any affiliates that have issued shares to the public.

5. Ludgate Insurance Company, Ltd. Ludgate Insurance Company is owned by Ken Randall Associates. Ludgate Insurance Company has no subsidiaries, and it does not have any affiliates that have issued shares to the public.

6. Assicuriazioni Generali, SPA. Assicuriazioni Generali, SPA does not have a parent corporation. Assicuriazioni Generali, SPA's subsidiaries (except wholly-owned subsidiaries) are the following:

Aurora Assicurazioni
Alleanza Assicurazioni
Friuli-Venezia Giulia Assicurazioni "La Carnica"
Agricoltura Assicurzaioni
Navale Assicurazioni
Unione Mediterranea di Sicurta
AdriaVita
AssiBa Societa di Assicurzaioni
Europ Assistance Italia
Edicom
Ediltaro
Crespim
Agricola San Giorgio
Sementi Dotto
Generali France
La Concorde
Compagnie Continentale d'Assurances
La Fédération Continentale

L'Equité
La Lutece
Européenne de Protection Juridique
Europ Assistance S.A.
Compagnie Dakar Saint-Louis
Generali Finances
Generali France et Cie.
S.A.I. des 154/156 Boulevard de la Gare
S.I. du Parc de la Noue
Sotrimlo
Generali Lebensversicherung
Deutscher Lloyd Lebensversicherung
Deutscher Lloyd Versicherung
Dialog Verischerung
Dialog Lebensversicherung
Erste Allgemeine Versicherung
EA Rechtsschutz-Versicherung
Generali Krankenversicherung
Interunfall Allgemeine Versicherung
Munchener Lebensversicherung
Europ Assistance Versicherung
Lloyd-Immobilien
Northern Star Insurance Co.
Europ Insurance Co.
Europa Assistance Insurance
Gefina International
Europ Assistance Holdings
Levensverzekering de Nederlanden van 1870
Schadeverzekering de Nederlanden van 1870
Levensverzekering Eerste Hollandsche
Schadeverzekering Eerste Hollandsche
Eerste Algemene Verzekering
Algemene Holding en Financiering
Beleggingsmaatschappij de Grachten
Graafschap Holland

Verzekeringsgroep de Nederlanden van 1870
Nedasinvest
Transhol
GME Generali-Midi Expansion
Redoze Holding
Lepaka
Nieuw Welgelegen
Caja de Prevision y Socorro
Covadonga
Europ Assistance Espana
Generali Belgium
Les Patrons Réunis
Union des Assureurs
Europaea-Assurance Protection Juridique
Generali Belgium Holding
Generali Belgium Invest
S.A. Immobiliere de la Toison d'Or
Souverain 100
Generali Life
Generali Hellas
Generali Vida
EA-Generali
Erste Allgemeine Versicherung
Generali Allgemeine Lebensversicherung
Generali Versicherung
CA-Generali Versicherung
Europaische Reiseversicherung
Interunfall Versicherung
Allgemeine Immobilien-Verwaltung
Brewo Grundstucksverwaltung
Union Suisse
Familia Lebensversicherung
Holdux
Pardux
Generali Sigorta

Generali Budapest Biztosito
Providencia Osztrak-Magyar Biztosito
Business Men's Assurance Company of America
Transocean Holding Corp.
Europ Assistance Worldwide Services
Gefina International N.V.
Holdux Curacao
Providencia Compania Argentina de Deguros
Providencia Compania de Seguro de Retiro
Generali do Brasil
Transocean do Brasil
Sao Marcos
Cia. Granadina de Seguros
Cia. Granadina de Seguros de Vida
Aseguradora General
Anglo Mexicana de Seguros
The Standard General Insurance Co.
Europ Assistance Worldwide Services (S.A.)
S.G.I. Properties

Companies affiliated with Assicuriazioni Generali, SPA are the following (at present it is unknown whether each of the companies listed herein have issued shares to the public):

Soc. Italiana Assicurazione Credit
Unione Italiana di Riassicurazione
C.G.M. International
Genercomit Distribuzione
Genercomit Gestione
Banca Internazionale Lombarda
Instituto Italiano di Credito Fondiario
Protos
Polis
Panditalia
RITA Cons. per la Rete Italiana Assicurativa

Servizi Technologici Avanzati
Sogeda
Sogeda Finanziaria
La Réunion Francise S.A.
La France I.A.R.D.
Midi Participations
SAI des Trois Collines de Mougins
Saint Christoly Bordeaux
Grand Bazar de Lyon
Société des Immeubles de Lyon
Saint-André Pey Berland
Sade Investisseurs
Soc. de Services Pour la Mémorisation des Documents
Telegos
L'Arthothéque
SAMSE
Credit Card Sentinel
Hambro Generali Fund Managers
Harris & Dixon IB (Jersey)
Helvetia Brand Nederland
Banco Vitalicio de Espana
B.N.P. - Generali, Entidad Gestora de Fondos de Pensiones
Banco di Roma (Belgio)
Emporiki Insurance Co.
Wiener Allianz Versicherung
Wiener Allianz Lebensversicherung
SK Verischerung
EBA Vermogensverwaltungsgesellschaft
RD-Beteiligung
CA-EA Investment
San Marco Investment
Interunfall-Leasing und Kreditvermittlung
CA-Generali Pensionskasse

CA-EA Pensionskassen-Studien und Beratung
Providentia - Soc. Suisse d'Assur. sur la Vie
Orion Rechtsschutz-Versicherung
Aegen International
George G. Zimmerman & Company
Hartford Line Slip
Federation Insurance Co. of Canada
Voyage Assistance International
Granja San Servolo
La Nacional
Seguros América
Europ Assistance De México
Compania de Seguros Atlas
U.S. Cap Insurance
Soc. d'Assistance et de Transport Médical
African Development Insurance
Leppard & Associates (Pty)
OTAS
Migdal Insurance Co.
World Marine & General Insurances

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STATEMENT OF THE CASE

This is a purely commercial breach of warranty action wherein Ethyl alleged that in 1986 and 1987, BP sold it an adulterated chemical compound for use in making a plastic film wrap for commercial food products. After making the wrap, Ethyl sold it to General Mills for use on Fruit Roll-Ups, a snack-food product.

The chemical compound was called Atmul 84K. This compound, although labeled Atmul 84K, was actually a concentrate containing Atmul 84K, B215, and LQA006, all in precise quantities prescribed by Ethyl. (R. 138). The "K" in Atmul 84K designated a kosher version of Atmul 84. (R. 347). Despite BP's reference to the product as "anti-fog" in its statement of the case, the record below does not reveal any non-food uses of a kosher chemical compound.

Ethyl purchased the Atmul 84K from BP pursuant to a contract which provided in part that:

> Seller [BP] warrants that the goods will conform to description and specifications and will be free from all defects in material and workmanship.

Pursuant to this purchase order, between July 1985 and January 1987, Ethyl purchased eight batches of Atmul 84K from BP.[4] (R. 85-86). The Atmul 84K consistently performed as tested and as intended, with one exception. That exception is a September 10, 1986 shipment of Atmul 84K which was contaminated with Tinuvin 770. (R. 312-13; 86-89).

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[4] Between 1981 and July 1, 1985, Ethyl purchased numerous batches of Atmul 84K from Reichold Chemical, BP's predecessor. (R. 267). On July 1, 1985, BP purchased Reichold and continued to sell Atmul 84K to Ethyl. (R. 85).

The aberrant September 10, 1986 shipment contained the Atmul 84K concentrate consisting of Atmul 84K, B215 and LQA006, but also contained Tinuvin 770. (R. 88-89). The Tinuvin 770 was a contaminant which rendered the concentrate defective and unsuitable for its intended use because it imparted an odor and off taste to the food product. (R. 86-87).

Contrary to BP's claims that Ethyl sold its film wrap to General Mills with certain written guarantees and that despite making these guarantees, Ethyl did not test its film wrap for off taste or odor and did not inform BP of the actual end use of its product, as the record below demonstrates, during the initial development of the film wrap, Atmul 84 was extensively studied and tested. By the time Ethyl decided to purchase commercial quantities of Atmul 84K from BP, the concentrate had undergone three testing procedures: 1) Ethyl's product development engineer's initial experiments with Atmul 84; 2) General Mills' independent testing of the experimental materials; and 3) Ethyl's final testing on the BP Atmul 84K concentrate itself. (R. 133, 137, 613-14). Each of these tests confirmed the propriety of Atmul 84K for its intended purpose -- film wrap for food products -- so long as the supplier provided the concentrate in an uncontaminated form.

In addition, as to BP's knowledge of the end use of its product, as the Eighth Circuit recognized, the parties disputed whether BP knew the compound would ultimately be used in food products.[5] (Pet. App. 3). However, the jury's findings of an express warranty along with a breach of that express warranty negate any assertion of lack of knowledge on the part of BP.

In 1987, after receiving complaints about the taste of some of the Fruit Roll-Ups, General Mills conducted a

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[5] References to petitioner's appendix will be hereinafter referred to as "Pet. App."

nationwide recall of Fruit Roll-Ups. (R. 87). It was later determined that the taste problems were caused by the presence of Tinuvin 770 in the film wrap. It was also determined, and in fact eventually admitted by BP, that the Tinuvin 770 contaminant was improperly contained in raw materials provided by BP and used by Ethyl to produce the film wrap. (R. 499-500). General Mills subsequently sued Ethyl. (R. 87).

Ethyl settled the General Mills lawsuit on July 5, 1989 for $8,960,000. (R. 88). Shortly thereafter, Ethyl sued BP on a variety of claims, including breach of express warranty, for providing it with a contaminated chemical compound. Ethyl sought damages from BP for all sums paid to General Mills, as well as damages for loss of revenue, loss of business advantage, costs and attorneys' fees. (Pet. App. 3).

Prior to trial, BP moved for summary judgment on all of Ethyl's claims against it. In response, the district court determined that the negligence and strict liability claims "sound in economic loss, and that the nature of the claimed loss is better resolved by the application of contract law than tort law." (Pet. App. 3). Consequently, it dismissed Ethyl's negligence and strict liability claims. Only Commercial Code issues of contract and warranty remained for trial.

Following the district court's order on the summary judgment motion, BP moved the district court for clarification of the prior ruling, asking it to hold that Ethyl's warranty claims were subject to the Iowa Comparative Fault Act or, alternatively, to certify the issue to the Iowa Supreme Court. In urging the application of the Comparative Fault Act to Ethyl's warranty claims, BP represented as follows:

> While the Court can, by employing a special verdict form, prevent or protect against the possibility that comparative fault will be later overturned on appeal, if the Court refused to submit comparative fault to

> the jury, and was later reversed, the only remedy would be a new trial.

(Resp. App. 12, n.4).[6]

The district court ultimately determined that the Iowa Comparative Fault Act applied to plaintiff's claims. It then denied the motion for certification without comment.

Prior to trial the parties entered into certain stipulations of fact. Two stipulated facts are particularly significant. First, BP stipulated to Ethyl's claimed damages in the amount of $9,367,000.00. Second, BP stipulated that it was the source of the Tinuvin 770 contamination. (R. 499-500). Thus, at trial, it was undisputed that BP caused the Tinuvin 770 contamination and that Ethyl's damages were at least $9,367,000.00.

When the case proceeded to trial, BP disavowed any knowledge that the Atmul 84K that it provided to Ethyl was to be incorporated into products intended for food use and, instead, portrayed Ethyl as the source of its own problems. The jury found to the contrary.

BP asserted and the district court instructed the jury on two theories of comparative fault: 1) that Ethyl failed to test the BP product or its product prior to sale to General Mills; and 2) that Ethyl failed to follow the law, Ethyl's own policy and industry custom by failing to obtain an FDA letter from BP before giving similar assurances to General Mills about FDA status and direct food application of its film wrap. (Pet. App. 12-13). Both of these theories were dependent upon a finding that BP was not aware of the end use of its product.

At the close of trial, the district court gave several substantive instructions to the jury, including on the issue of

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[6] References to respondents' appendix will be hereinafter referred to as "Resp. App."

damages. Specifically with respect to damages, the district instructed that:

> If you should find by a preponderance of the evidence that plaintiffs have been damaged, you may award them only such damages as will reasonably compensate and only such damages as you find they sustained as a proximate result of BP's alleged wrongful conduct.
>
> Beyond the purchase price paid by Ethyl for the BP product purchased in 1986, all of plaintiff's claims are for incidental and consequential damages. Consequential damages are those damages relating to any loss resulting from general or particular requirements or needs of the buyer which the seller had reason to know of at the time of contracting and which could not be reasonably prevented by the buyer. The particular needs of the buyer must be made known to the seller while general needs may be inferred from the circumstances.
>
> Any incidental and consequential damages you award must be foreseeable or have been reasonably foreseen at the time the parties entered into their contract.

(Pet. App. 10; R. 1820-21) (emphasis added).

Ultimately, the jury returned a verdict finding that BP had made an express warranty to provide specified materials free of contamination, BP had materially breached that warranty by providing contaminated materials, and that BP was a proximate cause of Ethyl's damages. (Pet. App. 14-15). In response to Interrogatory No. 4, the jury also found that plaintiff's damages were $9,367,000.00. (Pet. App. 15). For the damages to have been foreseeable under the damage

instruction quoted above, the jury must have determined that BP had reason to know that the Atmul 84K was to be used with food products and that the loss could not reasonably have been prevented by Ethyl. Thus, BP's claim that the jury found only that Ethyl was a cause -- not the cause of damages to Ethyl -- and that the stipulated damages of $9,367,000.00 reflect only those damages without reduction for fault, is unsupported.

Despite the purely contractual nature of the claims, which sought damages for economic loss alone, over Ethyl's objection, the jury was asked to apportion fault between Ethyl and BP for Ethyl's damages. The jury apportioned 30% of the fault to BP and 70% of the fault to Ethyl. (Pet. App. 16). Because Ethyl's fault was greater than that of BP, the court ordered judgment in favor of BP and dismissed the case.

Following post-trial motions, Ethyl and its insurers appealed the judgment in BP's favor and the denial of post-trial motions. As to the merits of the appeal, Ethyl argued, among other things, that the Iowa Comparative Fault Act did not apply to Ethyl's breach of warranty claims. Because the Eighth Circuit determined that the district court had committed error in applying the Iowa Act to Ethyl's claim, it did not reach Ethyl's remaining arguments. (Pet. App. 6).

BP's pretrial request to the district court for a special verdict form addressing comparative fault ultimately foreshadowed the Eighth Circuit's ruling. The Eighth Circuit reversed the district court's judgment, and remanded the case to the district court with directions to enter judgment of $9,367,000.00 in Ethyl's favor. (Pet. App. 6-7).

SUMMARY OF ARGUMENT

After determining that the Iowa Comparative Fault Act was inapplicable to Ethyl's claims, the Eighth Circuit Court of Appeals reversed the district court's judgment and remanded

the case with directions to enter judgment in Ethyl's favor. It did so based on the jury's express findings in favor of Ethyl on each element of Ethyl's claim against BP.

The applicability of the Iowa Comparative Fault Act to a commercial breach of warranty case is solely a state law issue which does not warrant review by this Court. Similarly, BP's claim that the Eighth Circuit's decision ordering entry of judgment in favor of Ethyl rather than a new trial does not conflict with decisions in other circuits, does not implicate the Fifth or Seventh Amendments in any way and does not depart from the accepted and usual course of judicial proceedings so as to require an exercise of this Court's power of supervision. BP's petition does not satisfy the criteria for certiorari and, therefore, should be denied.

ARGUMENT

BP's Petition Does Not Satisfy the Criteria for Certiorari.

Rule 10.1, U.S. Sup. Ct. R., provides in part that:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state "of last resort"; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned

such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

BP's petition is based on the claims that: a) the Eighth Circuit's disposition of this case creates an irreconcilable conflict with decisions in the Tenth Circuit and other circuits; b) the Eighth Circuit's disposition of this case raises questions of fundamental importance relating to Due Process and the Seventh Amendment; and c) the Eighth Circuit's disposition of this case departs from the accepted and usual course of judicial proceedings and requires an exercise of this Court's power of supervision. None of these claims warrants review by this Court.

A. The Eighth Circuit's Disposition of This Case Does Not Create an Irreconcilable Conflict With Decisions in the Tenth Circuit and Other Circuits.

Citing two Tenth Circuit cases, Jackson State Bank v. King, 992 F.2d 256 (10th Cir. 1993) and Zierke v. Agri-Systems, 992 F.2d 276 (10th Cir. 1993), and a single First Circuit case, Pratico v. Portland Terminal Company, 783 F.2d 255, 268 (1st Cir. 1985), BP claims that the Eighth Circuit's disposition of this case creates an irreconcilable conflict with decisions among the Circuits.[7] However, as this Court has stated:

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[7] It is noteworthy that, until BP's petition to the Eighth Circuit for rehearing, BP had failed to cite any authority to the Eighth Circuit in support of its position that, in the event that the Eighth Circuit determined that the Iowa Comparative Fault Act did not apply to Ethyl's claims, then Ethyl was entitled to a new trial but not judgment in its favor. The reason for this omission is clear. The cases BP now relies upon in fact supported Ethyl's position that the Iowa Comparative Fault Act does not apply to purely commercial breach of contract cases. See, e.g., Jackson State Bank v. King, 992 F.2d 256, 257 (10th Cir. 1993) (because plaintiff's claims were

> A principal purpose for which [the United States Supreme Court] use[s its] certiorari jurisdiction...is to resolve conflicts among the Circuit Courts of Appeals and state courts concerning the meaning of the provisions of federal law.

Braxton v. U.S., 500 U.S. 390, 391 (1991) (emphasis added). Here, however, the principal issue in dispute is not the meaning of a provision of federal law; the issue in dispute is the applicability of the Iowa Comparative Fault Act to a purely commercial breach of warranty case, a strictly state law issue.

BP's claim that the Eighth Circuit's decision in this case ordering entry of judgment in favor of Ethyl rather than a new trial conflicts with Tenth Circuit and First Circuit decisions on the proper disposition of cases is similarly misguided. These cases do not conflict with the Eighth Circuit's decision in any manner, let alone "on the same matter" or with respect to a "federal question" as required to invoke the Supreme Court's certiorari jurisdiction. U.S. Sup. Ct. R. 10.1(a).

In each of the cases BP cites, the Circuit Court was unable to discern the basis of the jury's determination of liability or damages from the jury's answers to special interrogatories or the verdict, necessitating a new trial. Jackson State Bank v. King, 992 F.2d 256, 258 (10th Cir. 1993) ("There is no way to discern from the jury's answers to the special interrogatories whether the damages were calculated properly"); Zierke v. Agri-Systems, 992 F.2d 276, 279 (10th Cir. 1993) ("The matter is further complicated because the special interrogatories did not specifically inquire

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contractual in nature, the application of the comparative negligence statute was incorrect); Little Rock Electrical Contractors v. Okonite Co., 294 Ark. 399, 402-03, 744 S.W.2d 381, 383 (1988) (jury improperly instructed to apply comparative fault principles in breach of warranty case).

as to whether the fault ascribed to plaintiff was in the nature of assumption of risk or simply a form of negligence....Therefore, we remand the case for a new trial on the issue of strict liability, with jury instructions that state current Wyoming law and interrogatories that specifically inquire as to whether John Zierke assumed a risk"); Pratico v. Portland Terminal Company, 783 F.2d 255, 268 (1st Cir. 1985) ("The basis of a restoration of the amount deducted below for contributory negligence, however, would be a finding that the defendant violated the OSHA regulation and that this violation caused plaintiff's injury. Such a finding was never made by the jury below because all testimony concerning the OSHA regulations was struck from the record"). This is not such a case.

This is a purely commercial breach of contract/warranty action wherein Ethyl alleged that BP sold it an adulterated compound for use in making a plastic film wrap that was later sold to General Mills and used in its Fruit Roll-Ups. Following trial, the jury was instructed on all substantive issues. BP objected to none of these instructions. The jury returned a verdict expressly finding that BP had made an express warranty, had breached that warranty, and had thereby caused Ethyl damages of $9,367,000.00.

BP does not dispute that the jury expressly found that BP had made an express warranty and had breached that warranty. Instead, it recharacterizes the jury's findings to fit a self-invented legal theory of "predominate [sic]" cause to replace the traditional legal concept of proximate cause, but to no avail. As the jury was instructed:

> Damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the damage, and that the damage was either a direct result or a

> reasonably probable consequence of the act or omission.
>
> This does not mean that the law recognizes only one proximate cause of damage, consisting of only one factor or thing, or the conduct of only one actor. On the contrary, many factors or things, or the conduct of two or more actors, may operate at the same time, either independently or together, to cause damage; and in such a case, each may be a proximate cause.

(Pet. App. 12; R. 1825). Thus, it can only be concluded from the jury's answer to Interrogatory No. 3[8] that BP's acts or omissions "played a substantial part in bringing about or actually causing the damage, and that the damage was either a direct result or a reasonably probable consequence of the act or omission."

Similarly, on the damage question, the jury found that Ethyl's damages were $9,367,000.00, as it was required to do.[9] Indeed, BP stipulated that Ethyl was damaged at least in the sum of $9,367,000.00. Moreover, the jury was specifically

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[8] Interrogatory number 3 and the jury's answer state:

> Was [BP's] breach a proximate cause of damage to [Ethyl]?
>
> Yes [X] No [ ]

(Pet. App. 15).

[9] Interrogatory number 4 and the jury's answer state:

> Making no reduction in fault, if any, you may attribute to plaintiff Ethyl, what are plaintiff's total damages? $9,367,000.00

(Pet. App. 15).

instructed that it could award only such damages as it found Ethyl "sustained as a proximate result of BP's alleged wrongful conduct." (Pet. App. 10). Thus, again, it can only be concluded that the jury properly awarded the stipulated damages of $9,367,000.00, damages which BP "had reason to know of at the time of contracting" and "which could not be reasonably prevented by [Ethyl]." (Pet. App. 10).

As the Eighth Circuit recognized, "the jury...found BP materially breached the express warranty and proximately caused Ethyl to incur $9,367,000.00 in damages." (Pet. App. 3). In the face of these clear jury answers, the proper disposition of the case was reversal and judgment in Ethyl's favor.

The disposition of this case does not create an irreconcilable conflict with cases in the Tenth Circuit, First Circuit or any other Circuit. BP has not satisfied the criteria for certiorari, and its petition should be denied.

B. The Eighth Circuit's Disposition of This Case Does Not Raise Questions of Fundamental Importance Relating to Due Process or the Seventh Amendment.

Without ever acknowledging that it expressly requested the special verdict form it now challenges, BP essentially claims that the district court's use of a special verdict form precludes any disposition of the case other than a new trial as violative of the Fifth and Seventh Amendments. These claims do not withstand more than a moment's scrutiny.

In urging the application of the Iowa Comparative Fault Act to Ethyl's warranty claims, BP represented the following:

> While the Court can, by employing a special verdict form, prevent or protect against the possibility that comparative fault will be later overturned on appeal,

> if the Court refused to submit comparative fault to the jury, and was later reversed, the only remedy would be a new trial.

(Resp. App. 12, n.4). BP received precisely what it requested. It is well settled that a party may not ask an appellate court to correct an error which that party persuaded the trial court to commit. United States ex rel. Brown v. City of Memphis, 97 U.S. 284, 292 (1877) (party cannot complain in appellate court of an order made at its request); New York Elevator R. Co. v. Fifth National Bank, 135 U.S. 432, 441-42 (1889) (party who procures ruling under which trial is conducted waives right to object to it).

The Eighth Circuit's disposition of this case is a textbook example of the purpose of Rule 49, Fed. R. Civ. P., which allows the use of a special verdict form in the discretion of the district court. One important practical advantage of the special verdict is that it increases judicial efficiency by reducing the occasions on which new trials must be had:

> [I]f the trial judge misapplies the law to the special verdict, he may correct his error without the necessity of a new trial. And of outstanding importance is the fact that the definite factual findings furnish a practical, concrete basis for the appellate court's evaluation of the case on review. If the only error involves a point of law or a misapplication of law to the facts by the trial judge, the necessity for a new trial should be eliminated.

Wright and Miller, 9 Federal Practice and Procedure: Civil § 2505, 494 (1971) (emphasis added).

The special verdict is particularly valuable in areas where the law is uncertain or in the process of development. Any errors in a case will not require a new trial because special

verdicts will have made it clear whether they had any effect on the result. Id. at 495; see also Thrash v. O'Donnell, 448 F.2d 886, 890 (5th Cir. 1971). These rationales directly apply to this case.

As the Eighth Circuit recognized, it could bring this case to an end without the waste of another trial. This is because, at BP's insistence, the district court carefully constructed a charge with special interrogatories which resolved the fact issues and thus enabled the appellate court, by determining the legal significance thereof, to translate the verdict into the appropriate judgment. See, e.g., Mills v. Mitsubishi Shipping Co., 358 F.2d 609, 610 (5th Cir. 1966).

The Eighth Circuit's disposition of this case does not implicate the Fifth or Seventh Amendments in any way. Citing Armstrong v. Manzo, 380 U.S. 545, 552 (1965), BP claims that it "received no meaningful review of the facts under the applicable law." (Petition at 18). This claim is absurd. In Armstrong, a divorced mother and her new husband completed adoption proceedings of a child from the mother's first marriage without providing notice to the child's actual father. Here, BP received an eight-day jury trial in the United States District Court for the Northern District of Iowa and plenary review of the District Court judgment in the Eighth Circuit. Unlike the petitioner in Armstrong, BP certainly was heard "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545,552 (1965).

Similarly, BP's reliance on Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines Ltd., 369 U.S. 355 (1962), for the proposition that the Eighth Circuit re-examined and rejected the jury's determination of facts is misguided. Unlike the lower court in Atlantic & Gulf Stevedores, Inc., the Eighth Circuit did not ignore express findings of the jury. On the contrary, the Eighth Circuit's decision merely gave effect to all of the jury's legally relevant answers to the special interrogatories BP requested while disregarding the one legally

irrelevant answer. The Eighth Circuit accordingly followed this Court's instructions in Atlantic & Gulf Stevedores, Inc. that "[w]here there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way." Id. at 364.

The jury found in favor of Ethyl on each of the elements comprising its claim against BP. There is no constitutional ground for BP's request for certiorari and, therefore, its petition should be denied.

C. The Eighth Circuit's Disposition of This Case Neither Departs From the Accepted and Usual Course of Judicial Proceedings Nor Requires an Exercise of This Court's Power of Supervision.

BP claims in the most conclusory fashion that erroneous instructions are presumptively injurious, that the district court's ruling that the Iowa Act applied to Ethyl's claims and its concomitant instruction to the jury were error, and that this alleged error requires an exercise of this Court's supervisory power to correct. However, BP did not object to these challenged instructions or rulings and, in fact, requested them. These facts alone preclude review.

Moreover, the alternative instructions BP proposes are essentially identical to those instructions actually given. For example, BP claims that if comparative fault had been ruled inapplicable prior to trial, then the case would have been tried and instructed under the principles of Iowa's Commercial Code. The jury would then have been instructed that any consequential damages must be shown to have been the result of defendant seller's alleged breach of warranty and that a plaintiff's consequential damages would not include any damages of which the defendant seller had no reason to know and which the plaintiff could not have otherwise reasonably prevented. (Petition at 21). However, as the damages

instruction given in this case demonstrates, the jury was instructed both that it could award only such damages as it found Ethyl "sustained as a proximate result of BP's alleged wrongful conduct," and that "consequential damages are those damages relating to any loss resulting from general or particular requirements or needs of the buyer which the seller had reason to know of at the time of contracting and which could not have been reasonably prevented by the buyer." (Pet. App. 10).

Similarly, citing no authority, BP claims that in lieu of apportioning fault, the district court would have instructed the jury to determine the extent to which factors other than BP's breach -- especially Ethyl's own acts or omissions -- proximately caused the consequential damages claimed. (Petition at 21). However, again, the jury was specifically instructed that consequential damages included only those damages which could not be reasonably prevented by the buyer, that is, Ethyl.

The jury found in favor of Ethyl on each of the elements of its claim against BP. It did so under instructions which provided the jury with an understanding of the issues and its duty to decide those issues. The instructions did not mislead the jury in any way. The Eighth Circuit's disposition of this case neither departs from the accepted and usual course of judicial proceedings nor requires an exercise of this Court's power of supervision.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Dated: January 20, 1995 Respectfully submitted,

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

ETHYL CORPORATION,

Plaintiff,

vs.

BP PERFORMANCE POLYMERS, INC.,

Defendant.

File Nos. C-90-2064
C-90-2072

DEFENDANT'S NOTICE OF MOTION AND MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE, FOR CERTIFICATION OF A QUESTION OF LAW
(oral argument requested)

PLEASE TAKE NOTICE that defendant BP Performance Polymers, Inc. ("BP") hereby moves the Court for clarification of the Court's ruling an BP's previous motion for summary Judgment specifically on the claims of plaintiff Ethyl Corporation ("Ethyl") for breach of express and implied warranties. BP contends that Ethyl's warranty claims are subject to comparative fault and therefore moves the Court for a ruling to that effect prior to trial. In the alternative, BP hereby moves the court, pursuant to Local Rule 23, for certification to the Iowa supreme court, the following question of law:

Whether Iowa's comparative fault statute, Iowa Coda § 668.1 ff (1987), applies to claims or defenses based on breach of express or implied warranties?

This Motion is based upon all the files, records, and proceedings herein, including BP's Memorandum in support of its Motion served and filed herewith, and upon all of the matters previously submitted to the court on BP's Summary Judgment Motion.

BP respectfully requests oral argument by telephone on this motion pursuant to Local Rule 14(c).

Dated this 28th day of July, 1992.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

ETHYL CORPORATION,

Plaintiff,

vs.

BP PERFORMANCE POLYMERS, INC.,

Defendant.

File Nos. C-90-2064
C-90-2072

DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE, FOR CERTIFICATION OF A QUESTION OF LAW

Defendant BP Performance Polymers, Inc. submits this memorandum in support of its Motion For Clarification Or, In The Alternative, For Certification Of A Question of Law pursuant to this Court's Local Rule 23.

INTRODUCTION

In February, 1992, Defendant BP Performance Polymers ("BP") brought a Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure seeking to dismiss all counts of the Complaint filed by plaintiff Ethyl Corporation ("Ethyl") in this consolidated action. Numerous legal issues were raised and briefed by the parties, and the Court, upon considering the matter without oral

argument, filed an order on July 8, 1992, granting summary judgment as to Ethyl's negligence and strict liability claims, and denying summary judgment as to Ethyl's remaining claims of breach of contract and breach of express and implied warranties ("July 8 Order").

However, the Court's July 8 Order leaves unresolved an issue disputed by the parties and of critical importance to the scope and outcome of this matter: whether Ethyl's claims for breach of express or implied warranty are subject to comparative fault under Iowa law. The Court's July 8 Order indicates that implied warranty claims can be the subject of indemnity and that if Ethyl wishes to seek indemnity on the breach of contract and breach of warranty claims alleged, it may do so. However, the Court's order does not specifically address the application of comparative fault to Ethyl's warranty claims. Because of the potential impact on the scope of issues to be presented and determined by the jury at trial in this case, BP seeks clarification from the Court or, in the alternative, a certification to the Iowa Supreme Court on the following question of law:

> Whether Ethyl's claims of breach of express and implied warranty are subject to comparative fault under Iowa law?

Resolution of this issue now will avoid repeated disagreements over evidentiary issues, the special verdict form, and the Court's jury instructions, as well as provide more certainty to the parties in preparing this case for trial. It may even reduce the likelihood of a reversal on appeal after trial. BP and Ethyl both recognize the role of comparative fault as a legitimate issue for pre-trial resolution.[1] In light of the pivotal

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[1] In the Proposed Pre-trial Order submitted by the parties on July 23, 1992, both BP and Ethyl state as legal issues to be resolved whether comparative fault applies to Ethyl's warranty claims. In fact, over BP's

nature of this issue, the Court should clarify its prior Order to address the applicability of comparative fault or, alternatively, certify this question to the Iowa Supreme Court pursuant to Local Rule 23 and Iowa Code § 684A.

ARGUMENT

I. THE COURT SHOULD RULE THAT ETHYL'S CLAIMS FOR BREACH OF EXPRESS AND IMPLIED WARRANTIES ARE SUBJECT TO COMPARATIVE FAULT ANALYSIS.

BP's position in its original summary judgment motion was that Iowa Code § 668.1 ff (1984) applies to Ethyl's claims of breach of warranty. See, BP's Memorandum In Support Of Summary Judgment (hereinafter "BP's Memo") at p. 12. The plain statutory language of Iowa's Comparative Fault Statute includes breach of warranty in the definition of conduct constituting "fault" governed by the statute. The Iowa legislature's intent is clear. Under the circumstances, it would be improper for a court to contract or expand the statutory definitions. Compare Tratchel v. Essex Group, Inc., 452 N.W.2d 171, 180-81 (Iowa 1990) (court refused to expand clear statutory definition to include fraud as basis for comparative fault where fraud is not mentioned in statutory definition of "fault").

Indeed, numerous recent decisions from the Iowa Supreme Court show that Iowa trial courts are applying comparative fault to breach of warranty claims. Cases decided after the effective date of Iowa's comparative fault statute

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objection, Ethyl has included in the Appendix to the Pre-trial Order its legal argument on the issue of whether comparative fault should apply. While the Court may properly direct a further briefing schedule for the parties on BP's present Motion, BP addresses below points raised by Ethyl's legal argument.

show that Iowa courts are construing breach of warranty claims in accordance with the legislature's expressed intent.[2] See, Renze Hybrids, Inc. v. Shell Oil Co., 418 N.W.2d 634, 641 (Iowa 1988).

For example, In Renze Hybrids, a product defect case, the only two theories of relief pleaded were breach of the implied warranties of merchantability and of fitness for a particular purpose. The trial court applied the Iowa comparative fault statute and, upon instruction, the jury found that the defendant was 75% at fault for plaintiff's damages. The trial court therefore entered a judgment in favor of plaintiff and against defendant for 75% of the full damages found by the jury. On appeal, the Iowa Supreme Court affirmed the trial court's reduction for plaintiff's comparative fault. Id., at 637, 641.

Other reported Iowa decisions show that Iowa courts apply comparative fault principles to cases involving breach of warranty. See, Meier v. Alfa-Laval, Inc., 454 N.W.2d 576, 578 (Iowa 1990) (claims of breach of implied warranty of fitness for a particular purpose and negligent misrepresentation made subject to comparative fault; court reduced damages by amount of plaintiff's fault); Hillrichs v. Avco Corp., 478 N.W.2d 70, 72 (Iowa 1991) (injured farmer's claims against manufacturer based on strict liability, breach of implied warranty, and negligence in designing corn picker were submitted to and decided by jury on comparative fault basis).

The only cases cited by Ethyl against the application of comparative fault pre-date Iowa's enactment of its comparative fault statute. See e.g., Ethyl's Memorandum of Law in Opposition to Defendant's [Summary Judgment] Motion, at pp. 6 - 15. These cases are therefore inapposite

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[2] Iowa enacted its Comparative Fault Statute (Iowa Code § 668.1 ff) in 1984 and it applies only to cases filed after July 1, 1984. The Statute applies in this case since Ethyl originally commenced this action in Iowa state court in August 1990.

and inconsistent with more recent Iowa case law. In keeping with the clear and unambiguous language of Iowa's comparative fault statute, and recent Iowa case law, this Court should rule that comparative fault applies to Ethyl's breach of warranty claims. The issue of Ethyl's comparative fault should therefore be resolved by the jury.

A. Ethyl's Mere Characterization of its Warranty Claims as Seeking Indeminification Does Not Prevent Application of Iowa's Comparative Fault Statute.

At summary judgment, Ethyl's position was that it was seeking full indemnity from BP for damages it incurred by reason of its own liability to General Mills. However, that Ethyl labels its action as one for indemnity does not make it so. Moreover, neither Ethyl's contentions nor its cited authority justify ignoring the operation of Iowa's comparative fault statute in this case.

In the July 8 Order, the Court recognized that indemnity is essentially equitable in nature, citing Howell v. River Products Co., 379 N.W. 919, 921 (Iowa App. 1986). Howell was not a case involving breach of warranty, but rather breach of a professional services contract. Moreover, given the adoption of Iowa's Comparative Fault Statute (subsequent to the Howell decision), reliance upon the holding in Howell to bar application of comparative fault is misplaced.

The Court in Howell recited several general propositions regarding claims and defenses for indemnity, including the general principle that indemnity exists for one who discharges a duty which "as between himself and another should have been discharged by the other, . . . unless the payor (indemnitee) is barred by the wrongful nature of its conduct." Howell, 379 N.W.2d at 921 (citing 41 Am. Jur. 2d Indemnity § 2, at 688 (1968) (emphasis added). The court in Howell found no evidence of any fault by plaintiff and

therefore no "necessity to examine the legal question of the applicability of comparative fault to indemnity cases. . ." Id., at 921.

Comparative fault as applied in Iowa recognizes that indemnity is not available to persons such as Ethyl whose own wrongful conduct is, in whole or in part, responsible for their own liability. Active-passive negligence, formerly recognized as a basis for indemnity in Iowa, has been specifically abolished following adoption of Iowa's comparative fault statute. None of the other traditional common law bases for indemnity apply to the relationship of BP and Ethyl. See, American Trust & Savings v. U.S. Fidelity, 439 N.W.2d 188, 190 (Iowa 1990), and BP's Memo, pp. 8-11.

The other cases cited and discussed by the Court also pre-date the Iowa Comparative Fault Statute. See, Peters v. Lyons, 168 N.W.2d 759 (Iowa 1969); Farmers Co-op v. Stockdale's Corp., 366 N.W.2d 184, 166 (Iowa 1985). Peters is a case involving a dog bite and broken dog chain. There is no doubt as to how Peters, a personal injury case, would be decided under Iowa's modern comparative fault scheme. The fault of the parties (the dog owner's strict liability and the dog chain seller's breach of warranty), along with any negligence attributable to the plaintiff, if any, would be apportioned and damages awarded accordingly. Similarly, in Farmers Co-op, after specifically noting that "no claim involving comparative fault is raised or considered," the court simply set forth and applied the general bases on which Iowa law recognizes claims for indemnity. Farmers Co-op, 366 N.W.2d at 186.

None of the authority addressing indemnity claims bars application of comparative fault, and BP seeks an Order ruling that comparative fault does apply to Ethyl's claims of breach of warranty.

B. Ethyl's Recent Arguments Age Similarly Inappositive.

Over BP's objection, Ethyl has submitted a memorandum as part of its legal contentions in the Pre-Trial Order, claiming that comparative fault does not apply in this case.3 However, Ethyl fails to acknowledge the fact that breach of warranty is specifically included in the definition of fault and instead relies upon irrelevant, uncontrolling case law.

First, plaintiff cites Hoover's Hatchery, Inc. v. Utgaard, 447 N.W.2d 684 (Iowa App. 1989). Hoover's did not involve any claims for breach of warranty. Instead, the plaintiff's claim was for breach of a requirements contract. Hoover's 447 N.W.2d at 685. Significantly, the Iowa Court of Appeals accepted the defendant's contention and the trial court's ruling that the plaintiff had failed to mitigate its damages upon defendant's breach of the requirements contract and therefore reduced the plaintiff's damages by 70% based on plaintiff's conduct following the sale. Id. at 688-89. Nothing in the language or result in suggests that breach of warranty claims are not subject to Iowa's Comparative Fault Statute.

Second, Ethyl cites to a case decided under Illinois law, See, Blommer Chocolate Co. v. Bongards Creameries, Inc., 635 F. Supp. 911, 635 P. Supp. 919 (N.D. Ill. 1986) ("Blommer I"); later decision, 644 F. Supp. 234 (N.D. Ill. 1986) ("Blommer II"). In Blommer II, the district court rejected the defendant's claim that comparative fault should apply based on the failure of plaintiff, a food manufacturer, to discover defects in dried whey powder purchased from defendant. Blommer II was not decided under Iowa law, and

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[3] Ethyl's inclusion of comparative fault as a legal issue concedes the necessity of BP's present motion and the Court's resolution of this issue prior to trial. Also, while Ethyl's legal memorandum goes on to discuss why Ethyl claims to be without fault, BP presently addresses only the fundamental issue: should comparative fault apply? If so, the extent of Ethyl's fault is a matter for the trier of the fact.

is not precedent for the issue of whether to apply Iowa's Comparative Fault Statute. Moreover, the case is factually distinguishable. The defendant in Blommer II supplied the dried whey powder with an unequivocal written guarantee that the whey was salmonella-free. In light of this fact, the court in Blommer II held that the purchaser was entitled to rely upon the defendant's express written guarantee. See, Blommer II, 644 F. Supp. at 238. The court in Blommers I and II found no facts which could support liability for the plaintiffs food manufacturer for failure to detect salmonella. In contrast, in this case there remain disputed issues of material fact as to whether BP made or breached any warranties and as to Ethyl's conduct. In any event, Blommer II does not stand for the proposition that the issue of comparative fault should be taken from the jury merely because the plaintiff alleges a right to full indemnity.

The decisions in Hoover's and Blommers I and II do not control Ethyl's warranty claims or BP's defenses based upon comparative fault. Accordingly, at the trial of this matter, BP will introduce evidence and seek an instruction and a special verdict including regarding BP's defense of comparative fault, i.e. that Ethyl's fault in whole or in part caused its liability to General Mills.

II. THIS COURT AND IOWA STATE LAW PROVIDE FOR CERTIFYING CONTROLLING QUESTIONS OF LAW.

This Court's Local Rule 23 and Iowa's Uniform Certification of Questions Act specifically authorize motions for certification from this Federal District Court to the Iowa Supreme Court. See, Local Rule 23; Iowa Code § 684A. Rule 23 permits certification of controlling questions of law to the highest state court under appropriate circumstances. BP submits that this Court has the authority to rule on the

question of law presented in this motion, and the plain statutory language and subsequent reported Iowa decisions show that BP's defense of comparative fault should be submitted to the jury on Ethyl's various warranty claims. Alternatively, if the Court is reluctant to decide that comparative fault applies, each of the necessary circumstances exist in this case to certify the issue to the Iowa Supreme Court. First, BP presents a purely legal question for resolution. Second, this legal question may be determinative of the course of action in that it significantly affects the need for certain witnesses, exhibits, jury instructions and deliberations.[4] Third, the issue is obviously disputed given Ethyl's claim that Comparative Fault does not apply. Ethyl's position contradicts the plain statutory language of Iowa Code § 668 and is unsupported by any controlling Iowa case law.

Accordingly, in the interest of judicial economy, the Court should act now to reconsider and clarify its previous summary judgment ruling regarding comparative fault or, in the alternative, certify this disputed question of law to the Iowa Supreme Court.

CONCLUSION

For all the foregoing reasons, defendant BP Performance Polymers, Inc. respectfully requests that the Court enter an order clarifying its summary judgment ruling as to Ethyl's breach of express and implied warranty claims and find specifically that Iowa's comparative fault statute applies to those claims or, in the alternative, certify the questions of law raised in this motion for review by the Iowa Supreme Court.

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[4] While the Court can, by employing a special verdict form, prevent or protect against the possibility that comparative fault will be later overturned on appeal, if the Court refused to submit comparative fault to the jury, and was later reversed, the only remedy would be a new trial.

Respectfully Submitted,

Dated: July 28, 1992.

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Supreme Court, U.S.
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(3)

No. 94-1141

In the

Supreme Court of the United States

October Term, 1994

BP PERFORMANCE POLYMERS, INC.,

Petitioner,

v.

ETHYL CORPORATION; TRAVELERS INSURANCE COMPANY; LUDGATE INSURANCE CO., LTD.; COMPAGNIE EUROPEENE d'SSURANCES INDUSTRIELLES S.A.; ASSICURIAZIONI GENERALI, S.P.A.; UTICA MUTUAL INSURANCE COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Ethyl's response contains nothing that should dissuade this Court from granting BP's petition. Rather than address directly the arguments and substantial federal questions presented by BP, Ethyl has resorted to ignoring and mischaracterizing the factual record below and the legal merits of BP's petition. Ethyl misstates the record, for example, by claiming that BP stipulated to an amount of damages caused by BP. (Res. 4.) This is simply not true. The parties only stipulated that Ethyl had spent approximately $9.3 million to defend and resolve Ethyl's underlying lawsuit with General Mills. BP never stipulated that that amount was proximately caused by BP's conduct. Indeed, the jury found that Ethyl itself was seventy percent at fault for the damages Ethyl claimed. In addition to factual errors of this sort, at least three legal arguments made by Ethyl warrant this reply.

I. Ethyl's Response Does Not Reconcile the Conflict that Now Exists between the Eighth Circuit and Other Circuits.

In its petition, BP cited and described decisions in both the Tenth and First Circuits with which the Eighth Circuit is now in direct conflict. Except of course for the holdings, the cases cited are *identical* in all relevant respects to this case, especially the Tenth Circuit's decisions in *Jackson State Bank v. King*, 992 F.2d 256 (10th Cir. 1993), and *Zierke v. Agri-Systems*, 992 F.2d 276 (10th Cir. 1993). Ethyl argues that this case is distinguishable because here the Eighth Circuit could supposedly discern from the comparative-fault verdict form exactly how the

jury would have decided the case had it not been instructed to apply comparative-fault principles. Ethyl tries to establish this with an analysis that only quotes select portions of the district court's damages instructions and virtually ignores the language and interrelationship of the various interrogatories on the verdict form.

Nowhere in its response, for example, does Ethyl explain – nor could it – how the Eighth Circuit could fairly say that the jury would have awarded $9,367,000 to Ethyl under correct instructions when that dollar amount (the stipulated sum that Ethyl paid to resolve its underlying lawsuit with General Mills) was given by the jury as an answer to Question 4, which asked: "*Making no reduction for fault, if any, you may attribute to plaintiff Ethyl,* what are [Ethyl's] total damages?" (App. 15 (emphasis added).) The jury, after all, in Question 6, found that *seventy percent* of the fault for all damages was attributable to *Ethyl,* not BP. These factual findings are simply irreconcilable with the Eighth Circuit's disposition of this case, and no court can fairly discern from the verdict form employed the amount of damages, if any, that the jury would have awarded to Ethyl if the jury had not been instructed under the comparative-fault principles of the Iowa Act.

Ethyl also ignores the fact that the jury knew what the effect of its answers would be on the district court's judgment. The jury was specifically instructed that if it found that Ethyl's "fault was more than 50% of the total fault, [Ethyl] cannot recover damages." (App. 11.) Because the jury found Ethyl seventy percent at fault, no court can reasonably assume that the jury would find in Ethyl's favor in any amount if it had received different

legal instructions. This is precisely the problem understood by the Tenth Circuit when it held that cases like this must be remanded for a new trial: " '[I]t would be manifestly unjust to assume in any way what the jury would have done had it been correctly instructed *and not misled regarding the effect on the judgment of its answers to the special interrogatories.*' " *Jackson State Bank*, 992 F.2d at 258 (emphasis added) (quoting *Phillips v. Duro-Last Roofing, Inc.*, 973 F.2d 869, 871 (10th Cir. 1992).).

II. BP's Petition Raises Questions of Federal Law and Appellate Procedure, Not State Law.

The Eighth Circuit's disposition of this case raises purely federal questions; no state law question of any sort is involved. Ethyl tries to convince this Court that the conflict that now exists between the federal courts of appeals is not on a point of federal law. Ethyl says: "the issue in dispute is the applicability of [the Iowa Act] to a purely commercial breach of warranty case, a strictly state law issue." (Res. 9; *see also* Res. 7 (same mischaracterization of BP's petition).) The Eighth Circuit's prediction on that state-law issue, however, was merely the predicate for its ultimate error in summarily disposing of this case in favor of Ethyl. Nowhere in BP's petition is any state-law question presented as an issue for this Court.

III. BP's Statement In a Pre-Trial Brief and the Fact that BP Proposed the Verdict Form that Was Used Are Irrelevant.

Ethyl sidesteps the importance of the federal constitutional issues raised by the Eighth Circuit's disposition of this case and argues, instead, that BP can have no constitutional objection or other complaint because BP proposed that a comparative-fault verdict form be used by the district court. Ethyl, as Justice Holmes would say, is shoveling smoke.

When BP submitted its proposed verdict form to the district court, the district court had already ruled that the Iowa Act applied to Ethyl's claims. In the light of that ruling, the proposed verdict form was not erroneous or prejudicial to any party. It simply followed the law as established by the district court. BP could not have submitted any other verdict form consistent with the district court's ruling. Only on appeal was the district court's ruling on the applicability of the Iowa Act determined to be wrong, and BP made it very clear in its brief to the Eighth Circuit that if the appellate court *did* reverse the district court on this point of law, a new trial was absolutely required. *See, e.g., Saunders v. State of Rhode Island*, 731 F.2d 81, 85 (1st Cir. 1984) (under very similar circumstances the First Circuit noted that the failure to object to the jury's charge was not fatal because "the basis for objection [to the jury's charge] only became known long after the charge was given").

Ethyl also tries to stretch and twist to its advantage one sentence written in a footnote in a pre-trial brief. This footnote said that the district court could use a verdict

form at trial to "prevent or protect against *the possibility* that comparative fault will be later overturned on appeal." This footnote was written long before any actual jury instructions or verdict forms were proposed to the district court by either side. Ethyl, however, would have this Court believe that by this footnote – and by the fact that BP submitted a proposed verdict form – BP has effectively waived all of its constitutional rights, including its right to due process and its Seventh-Amendment right to have no facts tried by the jury re-examined by any court. BP has waived none of these constitutional rights.

CONCLUSION

For the reasons stated in this reply and BP's petition, the petition for certiorari should be granted.

Respectfully submitted,

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